United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7316

ORIGINAL

B

P/S

To be argued by
BERNARD J. JAFFE

In The

United States Court of Appeals

For The Second Circuit

JOSEPH BOSSOM,

Plaintiff-Appellant,

vs.

NAOMI BOSSOM and STANLEY E. KOOPER,

Defendants-Appellees.

On Appeal from an Order from the United States District Court for the Eastern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

GELBWAKS & POLLACK
Attorneys for Plaintiff-Appellant
299 Broadway
New York, New York 10007
(212) 732-2540

(9937)
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PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Mark A. Constantino of the United States District Court for the Eastern District of New York. His opinion is unreported.

ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in declining to assume jurisdiction in this case.

2. Whether an action to rescind a stipulation or a separation agreement is a matrimonial action.

3. Whether the forfeiture provisions in the stipulation constitute penalties and as such are null and void and unenforceable.

4. Whether the defendants' affirmative defenses have any basis in fact or in law.

STATEMENT

This is an appeal from a judgment entered June 2, 1976, granting the defendants' cross motion to dismiss the complaint.

The plaintiff brought this action for the purpose of declaring certain provisions of a written stipulation (18a), between the plaintiff and Naomi Bossom, null and void (15a, 17a). The plaintiff also sought to rescind the entire stipulation (17a), and to have an escrow agreement (22a) signed by Naomi Bossom's attorney, Stanley E. Kooper, declared null and void, and to direct Mr. Kooper to return a deed which had been executed by the plaintiff and to declare the deed null and void (17a).

Naomi Bossom was granted a judgment of divorce against the plaintiff on July 1, 1974, by the Supreme Court of the State of New York, County of Kings. Plaintiff's answer in the matrimonial action, in which he was the defendant, was withdrawn after the plaintiff and Naomi Bossom had entered into the above stipulation on April 15, 1974, settling their matrimonial dispute and forming the basis for future payment of alimony and child support. The stipulation was incorporated in the subsequent judgment of divorce (4a).

The escrow agreement which was signed with the stipulation on April 15, 1974, provided for Mr. Kooper to hold a quitclaim deed, which had been simultaneously executed by the plaintiff to Naomi Bossom, in escrow pending future notice from Naomi Bossom that the plaintiff was in default

on any of his obligations, pursuant to the stipulation, for a period exceeding fourteen days. In the event that Mr. Kooper should receive such notice, the escrow agreement directs that he record the quitclaim deed without notice to any party (22a).

The plaintiff made a motion in the Supreme Court of the State of New York, County of Kings, in the matrimonial proceeding, to resettle the judgment of divorce so as to provide the stipulation entered into between the parties thereto be merged in the judgment and not survive. That motion for resettlement was denied (9a, 10a).

Subsequently, on August 28, 1975, plaintiff filed his complaint in the present action at the office of the Clerk of the United States District Court for the Eastern District of New York (B). Plaintiff alleges that the provisions of the stipulation and escrow agreement are invalid, unenforceable, and null and void pursuant to the laws of the State of New York (16a, 17a). The defendants in their answers deny that the provisions of the stipulation and escrow agreement are invalid and further assert as affirmative defenses that the complaint should be dismissed upon the principles of res judicata and election of remedies (23a, 25a).

A motion for summary judgment was made by the plaintiff (1a). Defendants filed a cross motion for dismissal of the complaint (27a).

The court below granted the defendants' cross motion on the ground that the action verges on the matrimonial or impinges upon the matrimonial jurisdiction of the state courts (35a).

APPLICABLE LAW

In an action whereby a United States District Court acquires juridiction as a result of the diversity of citizenship between the parties, the Court must apply the substantive law of the state in which it sits, including the forum state's conflicts of laws provisions. See Klaxon v. Stentor, 313 U.S. 487 (1941). In the matter now before this Court there is no doubt that the New York courts would apply the substantive contractual law of New York, the domicile of all parties at the time of the making of the stipulation and escrow agreement, and the place where both agreements were executed. All significant contacts are with the State of New York. See Auten v. Auten, 308 N.Y. 155 (1954).

SUMMARY OF ARGUMENT

I. An action involving a stipulation is not a matrimonial action, whether its purpose is to enforce the stipulation or to set it aside. The plaintiff could not have brought his action in the matrimonial courts in the State of New York but rather would have been required to institute an independent plenary proceeding. A matrimonial court could not have independently ordered the conditional forfeitures contained in the stipulation.

II. The present action is not one which falls under the general rule that federal diversity jurisdiction does not extend to matrimonial actions. The marital status of the parties has already been determined and is totally unaffected by this action. There are no complex issues of law requiring expertise in the area of domestic relations.

III. The provision in the stipulation providing for a conditional forfeiture of the plaintiff's interest in the marital home is a penalty and as such is null and void. The illegality of penalty provisions is not dependent upon any determination as to consideration. Every penalty has, at the very least, the consideration that the party exacting the penalty has agreed to contract.

IV. The provision in the stipulation providing for a forfeiture of visitation is a penalty and as such is null and void for the reasons given above and also for the protection of persons who are not parties to an agreement. The provision is unenforceable as a contract provision.

V. The defenses of res judicata and election of remedies must fail. The relief requested in the present action not only is completely different from that sought in the matrimonial court of the State of New York, but also could not have been granted by that court.

ARGUMENT

POINT I

AN ACTION TO RESCIND A STIPULATION OR A SEPARATION AGREEMENT IS NOT A MATRIMONIAL ACTION

It has long been a settled law of the State of New York that an action involving a stipulation or a separation agreement, whether to be to enforce the agreement or to set it aside, is not a matrimonial action. In Marson v. Marson, 6 A.D.2d 786, 175 N.Y.S.2d 82 (1st Dept., 1958), aff'd. 6 N.Y.2d 925, 190 N.Y.S.2d 998 (1959) the Appellate Division in New York reversed a lower

court's award of counsel fees to the attorney for the wife in an action by her husband to have their separation agreement declared void. Although the wife had successfully defended the action, the court held that it was not a matrimonial action within the purview of the laws of the State of New York.

Ariel v. Ariel, 5 A.D.2d 168, 171 N.Y.S.2d 138 (1st Dept., 1958) infra, holds that an independent action is necessary to rescind a prior matrimonial settlement. This conclusion was also reached in Berkey v. Berkey, 24 Misc.2d 711, 203 N.Y.S.2d 717, 721 (Sup. Ct., 1960). In an action to set aside a separation agreement, the wife moved for an examination before trial and for production of the husband's books and records. The husband opposed the wife's motion on several grounds, one of which was that such disclosure was not permitted in a matrimonial action. The court answered this agrument as follows:

> The defendant urges that the action is a matrimonial action, because a separation action arises out of a marriage. This contention can not be sustained, for every separation agreement must be based upon a marriage. The cases cited above clearly show that, while this agreement arises out of a marriage, it is not considered a matrimonial action. If the courts or Legislature had intended that these agreements be matrimonial matters, they would have so indicated. The facts are to the contrary...

The defendants did not cite one New York case, in their memorandum of law submitted in the lower court, which holds that an action to set aside a stipulation or separation agreement between a husband and wife is a matrimonial action. On the contrary, no such cases can be found because the law of New York is in direct opposite.

Certainly, if the courts of the State of New York have chosen to treat actions involving stipulations or separation agreements as non-matrimonial actions, it would not be proper for the federal courts to decide otherwise. As has been shown, the relief which is requested in this action could not be obtained in the matrimonial action, in which the only matter which was pending, on the return date of the cross motion, was a motion for a downward modification in child support payments. That motion had no relationship whatsoever with the present action to declare certain provisions of the stipulation null and void. A decision favorable to the plaintiff in that action would have had no effect on his obligations to his children pursuant to the judgment of divorce. The stipulation survived the judgment of divorce and must be treated as a separate and independent contract between the parties.

As has been shown the courts of New York do not consider this action to be matrimonial in nature.

Furthermore, had the plaintiff and Naomi Bossom not entered into the stipulation, the provisions contained in Paragraph 5 thereof (20a), with regard to a forfeiture of his interest in the marital home, could not have been contained in the judgment of divorce. It was only by the adoption of §234 of the Domestic Relations Law of the State of New York that questions as to title to property may be determined in an action for divorce. Prior to the enactment of this section, all such questions had to be adjudicated in an independent action.

In the Practice Commentary in McKinney's Consolidated Laws of New York Annotated, Book 14, Domestic Relations Law, at page 126, David D. Siegel states:

> One thing is certain. The legal criteria by which title questions are to be decided between husband and wife are not in any manner changed by section 234. The section in this regard effects only a procedural change...The only difference traceable to section 234 is that such an issue, or cause of action, may now be litigated in a marital action (subject to the court's powers of severance and separate trial under CPLR 603)...

Clearly, a court's power to provide for a conditional forfeiture of a party's property does not change as a result of a marital relationship. If such a forfeiture would constitute an illegal penalty, it makes no difference that the forfeiture is from a husband to a wife.

POINT II

THIS ACTION IS NOT BARRED BY THE GENERAL RULE THAT FEDERAL DIVERSITY JURISDICTION DOES NOT EXTEND TO MATRIMONIAL ACTIONS

The court below cites Kamhi v. Cohen, 512 F.2d 1051 (2d Cir., 1975), as the basis for dismissing the present action (34a, 35a) The case has no applicability whatsoever to the matter at hand.

In affirming the judgment of the lower court in Kamhi, supra, on the ground that the plaintiff failed to join a necessary party, specifically the plaintiff's former wife, the Court of Appeals discusses the policy of federal courts with respect to jurisdiction in matrimonial matters. At 512 F.2d 1056 the court states:

> ...Whether one calls it comity or something-else, it would seen inappropriate for the federal court, absent jurisdiction of Mrs. Kamhi, to subject the sequester to inconsistent decrees.

The language quoted by the court below is taken out of context and is incomplete as is shown by the sentences following which were left unquoted and which state:

> We believe, however, that appellant should be given an additional 30 day's leave to serve and file an amended complaint, naming Mrs. Kamhi as a party, after remand to the District Court. We request the court below to grant such leave.

If this decision has any significance to the present action, it supports the assumption of federal jurisdiction.

In Graning v. Graning, 411 F.S. 1028, 1029 (S.D.N.Y., 1976), the court holds:

> The defendant mistakes the nature of this action which is essentially a breach of contract suit. The marital relationship between the parties has apparently already been determined and is not in dispute. Accordingly, diversity of citizenship affords an adequate basis for subject matter jurisdiction in this dispute. See Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y.1968); Richie v. Richie, 186 F.Supp. 592 (E.D.N.Y. 1960); Gonzales v. Gonzales, 74 F.Supp. 883 (E.D.Pa.1947).

As in Graning, the present matter is essentially a contract action, here involving rescission or partial rescission; and the marital relationship between the parties has already been determined and is not in dispute. Also see Southard v. Southard, 305 F.2d 730 (2d Cir., 1962), where federal jurisdiction was entertained.

Turpin v. Turpin, 415 F.S. 12 (W.D.Okla., 1975) presents an excellent analysis of when the Domestic Relations Rule should not be applied at pages 13 and 14. That case also involved a property settlement agreement which was approved before the divorce decree. The court's statement at 415 F.S. 14 is equally applicable to the case at hand:

> The instant case involves both an alleged contractual wrong and an alleged tortious wrong. Neither of said wrongs appears to rise out of

> the parties' marital relationship. Said marital relationship terminated with the Divorce Decree of February 22, 1974. Although Defendant herein was required under said Decree to provide support to Plaintiff herein, the agreement relating to a sale of the property which gives rise to the instant action is wholly unrelated to said support payments. The status of the parties does not appear to be affected by the instant dispute and it cannot be said that the instant action is primarily a marital dispute.

The defendants rely on the case of Solomon v. Solomon, 516 F.2d 1018 (3rd Cir., 1975), as support for their cross-motion to dismiss the plaintiff's complaint. This is the only case which the defendants have cited in support of their cross-motion or in opposition to plaintiff's motion for summary judgment. The only similarity which the Solomon case bears to the case at hand is that both cases involve agreements between a husband and wife prior to an action for divorce.

At 516 F.2d 1025 the court states:

> In holding that the domestic relations doctrine applies to the case before us, we do not mean to suggest that a separation agreement may never be litigated in the federal courts by parties between whom there is diversity of citizenship. In a different case, in which the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts, and in which there was no threat that a feuding couple would

> play one court system off against the other, we might well assume jurisdiction. But all of the above dangers are involved in the present case and lead us to the conclusion that the domestic relations doctrine should apply...

None of the above criteria are present in the case now before the Court.

The present action does not involve the custody of any child. There is no pending action in the state courts with respect to the relief requested in the complaint in this action nor could there be in the absence of the commencement of a new action in the state court. There was never any agreement to litigate in a New York court. Similarly, the plaintiff and defendant can not be characterized as a feuding couple or playing one court system off against the other.

This is the first action involving any of the parties which has been commenced by the plaintiff. As an out of state resident, he had the right to choose a forum where he felt there would be the least amount of prejudice against him. This has long been recognized as one of the basic reasons for federal diversity jurisdiction. Any proceedings which the plaintiff may have initiated in the matrimonial action in the Supreme Court of the State of

New York resulted from the fact that the plaintiff had no choice of forum with respect thereto. Any modification of the judgment of divorce had to be brought in the state court. This action simply seeks to excise a penalty clause from a contractual agreement between two parties. There can be no valid assertion that plaintiff is forum shopping.

In Richie v. Richie, 186 F.S. 592 (E.D.N.Y., 1960), an action to enforce the payment provisions of a separation agreement, at 594 the court states:

> The defendant's motion to dismiss "Count Two", of the complaint is denied. The plaintiff's claim does not involve domestic relations. It is one to recover damages for breach of contract as between parties who are not husband and wife.

The holding of Solomon v. Solomon, supra, has not prevented the federal district courts from exercising jurisdiction with respect to a separation agreement, even within the Third Circuit itself. See Zimmermann v. Zimmermann, 395 F.S. 719 (E.D.Pa., 1975). In Elliott v. Elliott, 355 F.S. 48 (S.D.N.Y., 1973) the court also held that there was subject matter jurisdiction with respect to an action involving a separation agreement.

Judge Weinstein has presented a thorough analysis of the Domestic Relations Rule in the case of Spindel v.

Spindel, 283 F.S. 797 (E.D.N.Y., 1968). He is critical of any broad use of the doctrine to deny access to the federal courts. He concludes that there is jurisdiction in practically every matrimonial case where a divorce is not sought (805-811).

The defendants' argument in the present case that the cross motion to dismiss should be granted upon grounds of comity and so as not to interfere with the public policy of the State of New York is summarily dealt with in Spindel v. Spindel, supra. At 283 F.S. 811 the court states:

> No "recognized exception" is present in this case. There can be no question of interference with state policy, for under Erie, we are asked to do exactly what a state court would do. The mere fact that a matter is one which has traditionally been of state concern is not sufficient to justify abstention...Whether a remedy is provided in a federal or state forum is irrelevant. "[T]he basic premise of federal jurisdiction based upon diversity * * * is that the federal courts should afford remedies which are co-extensive with rights created by state law and enforceable in state courts."...

The opinion in Spindel v. Spindel, supra, is cited with approval in Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir., 1973). The Court of Appeals also suggests that the Domestic Relations Rule be applied narrowly. One major difference between this case

and the case at hand should not be overlooked. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel involved a New York plaintiff who used diversity jurisdiction to bring its action in the United States District Court for the Southern District of New York. The court states at 490 F.2d 515:

> ...The action not only presents the anomaly of a jurisdiction intended to protect out-of-staters against local prejudice being invoked by an instater, see ALI, Study of the Division of Jurisdiction Between State and Federal Courts 99-110 (1968), but the instater is a law firm that has practiced, long and successfully, in the New York courts. The defendant, although a resident of Connecticut or later of Florida, maintained a New York City apartment and his business interests were focused in New York. The services for which compensation is sought were rendered in New York courts. Most important of all, decision requires exploration of a difficult field of New York law with which, because of its proximity to the exception for matrimonial actions, federal judges are more than ordinarily unfamiliar. Moreover, the claim for services on appeal on the award of alimony and counsel fees necessitates the interpretation of a decree of a New York Supreme Court Justice who sits only a few hundred yards from the Federal Courthouse in New York City.

None of the conditions criticized by the court are present in the action now before this Court. Most cogent is the fact that the plaintiff is not the resident of New York and the very purpose for diversity of jurisdiction is clearly present.

The present action involves no complex issue of matrimonial law but rather a simple question as to whether

a clause in a stipulation between two parties is a penalty. There is no justification for refusing jurisdiction in this matter and such refusal constituted error by the court below.

POINT III

THE FORFEITURE PROVISION IN THE STIPULATION CONSTITUTES A PENALTY AND IS THEREFORE NULL AND VOID AND UNENFORCEABLE

In deciding not to assume jurisdiction in this action, the court below failed to reach the question of whether the plaintiff is entitled to summary judgment. In the event that this Court holds that the lower court erred, it is respectfully requested that the question of summary judgment be decided.

A provision in a contract or agreement which provides for a forfeiture in the event of a breach by one of the parties must bear some relationship to the actual damages resulting therefrom. If the forfeiture clearly exceeds the resultant damages, then the provision will be considered a penalty and will not be enforced.

In Kroll v. Kroll, 4 Misc.2d 520, 158 N.Y.S.2d 930 (Sup. Ct., 1956) the court held that a provision in a separation agreement which provided that the husband's

obligations be increased from the sum of $180 per week to the sum of $400 per week in the event of a default by the husband constituted a penalty and was void. At 4 Misc.2d 522, 158 N.Y.S.2d 932 the court states:

> It is manifest that the provision of the separation agreement under which plaintiff obligated himself to pay $400 per week instead of $180, in the event of default, when read with the provision immediately following it, constituted a penalty and is void. (See, generally, 1 New York Law of Damages, §13).

The provision in the separation agreement which followed the cited provision stated that if the property settlement payments were not made, the wife could take steps to enforce collection of the provisions of the agreement, including the right to cancel and terminate it.

The stipulation which is the subject of the case at hand provides for a penalty which is far more onerous than that which was discussed in Kroll. Upon the default of any payment by the plaintiff for a period of fourteen days, he will irrevocably forfeit his half interest in the marital home owned by plaintiff and Naomi Bossom (20a). Not only does a default result in such forfeiture, but the stipulation also provides that the forfeiture shall not relieve the plaintiff from any of his support obligations. There can be no question that such a provision is a blatant and obvious penalty which is contained therein for

the sole purpose of securing or forcing performance under the terms of the stipulation. See Tarro Building Industries Corp. v. Schwartz, 54 Misc.2d 13, 281 N.Y.S.2d 420 (App. Term, 2d Dept., 1967).

In Manhattan Syndicate v. Ryan, 14 A.D.2d 323, 327, 220 N.Y.S.2d 337, 340, the court in rejecting a damage provision as unenforceable states:

> ...It is a relevant general rule that a failure to pay a sum of money due will rarely, if ever, justify a further sum, in excess of interest, to be paid by way of liquidated damages. On the contrary, such a requirement is likely to be condemned as a penal forfeiture which the law will not recognize.

Also, to the same effect, see Gilad Realty Corp. v. Ripley Pitkin Ave., Inc., 48 A.D.2d 683, 368 N.Y.S.2d, 228 (2d Dept., 1975).

The forfeiture provision is not only unenforceable as a penalty, but it is also so onerous as to be unconscionable. There is no opportunity for the plaintiff to explain any default in payment, regardless of the merit of any excuse therefor. Neither sickness, emergency, nor even a mistake on the part of a bank or other third party would stop the absolute and irreversible effect of a simple fourteen day default. Plaintiff would forfeit a property interest believed to approximate the sum of $40,000 as a result of having missed one $540 payment.

POINT IV

THE PROVISION IN THE STIPULATION CONDITIONING VISITATION UPON FULL COMPLIANCE IS NULL AND VOID AND UNENFORCEABLE

Pursuant to the terms of the stipulation a default by the plaintiff for a period of fourteen days would result in a forfeiture of visitation with his children. This effects a penalty against the children which violates public policy of the State of New York, and therefore is null and void and unenforceable.

Visitation between parents and their children is a matter which is within the sole discretion of the matrimonial court to decide. It is only in that forum that the best interests of the children can be protected. Naturally the court may sanction such noncompliance with child support orders by revoking visitation privileges. However, it is only after a finding of willfulness that such drastic action may be taken. In their well known treatise on matrimonial law, Zett, Edmonds, and Schwartz in New York Civil Practice, Volume 11B, §40.17 state that a father's free exercise of visitation rights can not be restricted by a condition that child support be paid if the father can not comply with such a condition.

In considering the situation in reverse whereby the husband attempted to condition child support on visitation,

the Appellate Division in Klarish v. Klarish, 29 A.D.2d 929, 289 N.Y.S.2d 65 (1st Dept., April, 1968) held that such a provision could result in possible prjudice to the interests of the child. Certainly, this same argument may be made in reverse.

The unconscionability of plaintiff's loss of visitation in the event of a default regardless of the reasons therefor, is clearly present for the reasons previously stated under Point III.

POINT V

THE DEFENDANTS' AFFIRMATIVE DEFENSES HAVE NO BASIS IN FACT OR IN LAW

The defendants in their answers raise the affirmative defenses of res judicata and election of remedies. These defenses have no application with respect to the case at bar.

The relief sought in the complaint herein could not have been obtained with the motion for resettlement of the judgment of divorce made in the matrimonial action in the Supreme Court of the State of New York. An action deciding the validity of the stipulation could have only been brought by way of a plenary proceeding.

In the case of Ariel v. Ariel, 5 A.D.2d 168, 171 N.Y.S.2d 138 (1st Dept., 1958), supra, the court states:

> There was neither ambiguity in language nor doubt of circumstance. It became a contract valid and enforceable creating new liabilities for the parties. The Court cannot on affidavit vacate this settlement of separation which was independent of the action before it. The remedy, if any, must be by 'an independent suit to upset the settlement for reasons that would invalidate a contract such as fraud or overreaching.'

By bringing this plenary action, the plaintiff has proceeded in the only way possible to obtain the relief sought herein.

CONCLUSION

For the foregoing reasons, the judgment of the District Court granting the defendants'-appellees' cross motion for a dismissal of the complaint should be reversed, and the plaintiff's-appellant's motion for summary judgment should be granted.

Respectfully submitted,

GELBWAKS & POLLACK
Attorneys for Plaintiff-Appellant
Office and P.O. Address
299 Broadway
New York, New York 10007

BERNARD J. JAFFE,
Of Counsel

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPH BOSSOM,

Plaintiff-Appellant,

- against -

NAOMI BOSSOM and STANLEY E. KOOPER,

Defendants-Appellees

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Velma N. Howe, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11[illegible]
That on the 15th *day of* September *19* 76 *, deponent served the annexed*

brief *upon* Stanley Kooper *attorney(s) for*

Defendants-Appellees *in this action, at* 16 Court Street Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing 2 *true copies of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 15th
day of September *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Velma N. Howe

Velma N. Howe